No. 80-1852

JUN 1 1981
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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN P. McGOFF, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court, in ordering enforcement of the Commission's investigatory subpoenas, sufficiently accommodated petitioners' First Amendment interests by narrowing the scope of the Commission's subpoenas to exclude any documents relating solely to editorial policy or news gathering.

2. Whether the district court correctly entered a protective order against discovery into the deliberative processes leading to the Commission's decision to institute an investigation of petitioners' activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not yet reported. The orders of the district court (Pet. App. 17a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1981. The petition for a writ of certiorari was filed on May 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1979, the Securities and Exchange Commission ordered an investigation to determine whether Panax Corporation (a publicly-held corporation engaged in the newspaper publishing business) and petitioners John P. McGoff (president and director of Panax), Global Communications Corporation (a holding company wholly owned by McGoff), and Sacramento Publishing Company (a wholly owned subsidiary of Global), had violated anti-fraud, reporting, beneficial ownership, and proxy provisions of the federal securities laws (A. 4-5).[1]

The Commission initiated its investigation following the receipt of information indicating that petitioners acquired approximately 40% of Panax's outstanding stock (A. 15-16, 159-162) without making the disclosures required by the federal securities laws respecting the source of the funds used to make the acquisition,[2] and that thereafter petitioners, in a self-

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[1] See Sections 10(b), 13(a), 13(d) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78m(a), 78m(d) and 78n(a); and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13d-1, 13d-2, 14a-3 and 14a-9 thereunder, 17 C.F.R. 240.10b-5, 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13, 240.13d-1, 240.13d-2, 240.14a-3 and 240.14a-9. ("A." refers to the joint appendix in the court of appeals.)

[2] The information leading to the investigation included an official, published report of the Erasmus Commission, a judicial commission appointed by the South African government. The Erasmus Commission reported that the South African government had been interested in financing the purchase of news organizations in order to create favorable public opinion concerning South Africa (A. 153-154, 166-172), and that the South African government had given McGoff $11.3 million for this purpose (A. 153-154, 159-160). Shortly after receiving these funds from the South African government,

dealing transaction, utilized the assets of Panax itself to repay the funds they had used to make the original purchases.[3]

Acting pursuant to the Commission's order of investigation, Commission staff members issued subpoenas duces tecum to petitioners on July 13, 1979 (A. 13, 22-39). Those subpoenas called for the production of documents pertaining to, among other things, the persons who had advanced funds to petitioners and petitioners' transactions involving securities issued by or belonging to Panax, Sacramento and Global.

2. Petitioners refused to comply with the subpoenas and the Commission sought enforcement in the United States District Court for the District of Columbia. Petitioners then served interrogatories and a document production demand on the Commission for the stated purpose of determining whether the Commission's investigation was part of a coordinated effort by the United States government to

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petitioners, according to public reports filed by them with the Commission, began making substantial purchases of the stock of Panax, which publishes daily and weekly newspapers in the United States (A. 160-161).

Although petitioners purported to comply with Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(d), which required them to file reports with the Commission disclosing certain information concerning their financing arrangements for the purchases of Panax stock, petitioners' reports contained no reference to the use of South African funds or to any arrangements or understanding with the South African government (A. 161-163, 182-198). Likewise, no disclosure of such matters was made in Panax's annual or periodic reports, or in proxy solicitation materials.

[3] Petitioners obtained $1 million in cash from Panax in exchange for certain assets (A. 162).

harass petitioner McGoff (Pet. App. 38a-43a). The Commission moved for a protective order.

Following a hearing, the district court granted the Commission's motion and precluded petitioners' attempted discovery (Pet. App. 17a). The district court also found that the Commission's subpoena demands were "reasonably related to the lawfully authorized powers of the Commission" (*id.* at 18a). The court ruled, however, that petitioners were not required to furnish "any document which solely relates to editorial policy or solely relates to information obtained as part of the process of gathering news for possible publication" (*ibid*). The district court also expressly reserved the right of petitioner McGoff to assert any claim he may have under the Fifth Amendment (*id.* at 19a).

3. The court of appeals affirmed (Pet. App. 1a-16a). The court observed that petitioners, having voluntarily associated themselves with a publicly-held corporation, "enjoy no special privilege as 'press entities' to withhold information others must furnish to the investing public" (*id.* at 8a). The court also noted that the violations subject to investigation were not merely "minor infraction[s] of a technical rule" (*id.* at 12a). The court of appeals emphasized that the federal securities laws are laws of general applicability that do not directly regulate First Amendment rights and that persons engaged in the business of publishing are not exempt from those laws. In light of this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665, 701-706 (1972), the court of appeals rejected petitioners' argument that, because petitioners are engaged in publishing, the Commission's subpoenas should be subject to a special, more stringent standard (Pet. App. 11a).

The court noted, however, that "some balancing or special sensitivity is required in view of the vital function the press serves in a self-governing society" (Pet. App. 10a). The court concluded that the appropriate accommodation was achieved by the district court's ruling that documents relating solely to editorial policy or news gathering need not be produced. The court noted, in this regard, that the district court's order could be interpreted to allow petitioners to withhold both whole documents and segregable portions of documents that fall within the excepted categories (*id.* at 10a-11a), and that petitioner "McGoff, who was to make the judgment in the first instance whether an item fell within the exception, might have sought clarification from the district court if he genuinely believed the order did 'nothing to protect' his editorial or news gathering activity" (*id.* at 11a; footnote omitted).[4]

The court of appeals also agreed with the district court that petitioners had failed to establish that they were entitled to discovery into the Commission's deliberative processes in this summary subpoena enforcement proceeding. The court concluded that petitioners' "diffuse speculations concerning possible misuse of administrative authority" did not constitute a sufficient basis to permit intrusive discovery into the agency's internal deliberations (Pet. App. 16a). In this connection, the court observed that petitioners had failed to allege concrete facts warranting an inference of bias or harassment (*id.* at 15a) and that the Commission had a specific factual basis for suspecting that petitioners had violated the securities

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[4] The court of appeals rejected petitioners' argument that the subpoenas were broader than necessary. The court found that, while the demands were broad, they were proper because "the nature of the inquiry precludes a trim list of requests" (Pet. App. 18a).

laws. The court emphasized that the Commission based the investigation in significant part on "information revealed in an official, published report of the Republic of South Africa" (*ibid.*).[5]

4. Petitioners' motions for a stay of the district court's order were denied by the court of appeals and by this Court. 445 U.S. 922 (1980). Petitioners complied with the subpoenas subsequent to the decision of the court of appeals.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. Petitioners have complied with the subpoenas that they seek to challenge in this Court (Pet. App.

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[5] The Commission's application for enforcement of its subpoena, and the affidavit of its staff attorney, stated that the investigation was based on specific facts contained in the Erasmus Report and on documents filed with the Commission (A. 4-17). The affidavit stated that the Erasmus Report, which was the product of a Judicial Commission instituted by the South African government to inquire into irregularities in that government's former Department of Information, had received evidence from 91 witnesses and had compiled an extensive record. The Judicial Commission reported, among other things, that petitioner McGoff received in excess of $11 million from the South African government for the purpose of purchasing interests in news organizations (*id.* at 15-16). Shortly after this advance, petitioner McGoff began to acquire Panax stock (*id.* at 160). The filings submitted by petitioners to the SEC failed to disclose any financing by the South African government (*id.* at 161-162).

7a). Even if the present case is not technically moot,[6] this Court should not exercise its discretion to grant a petition for a writ of certiorari in a case in which the subpoenas at issue have been fully complied with, the factual and legal issues presented by petitioners are devoid of continuing practical significance, and any opinion rendered by the Court would have the characteristics of an advisory opinion.

2. Contrary to petitioners' contention on the merits (Pet. 14), the courts below did accord special consideration to their First Amendment concerns. In ordering enforcement of the Commission's subpoenas, the district court narrowed the subpoenas to exclude documents relating solely to "editorial policy" or "information obtained as part of the process of gathering news for possible publication" (Pet. App. 18a). The court of appeals expressly found that the subpoenas, as modified by the district court, fully accommodated petitioners' interests in avoiding "unnecessary encroachment upon McGoff's activities and associations as a newspaper publisher and writer" (*id.* at 10a). Nor is there merit to petitioners' assertion (Pet. 18) that the court of appeals made no "meaningful examination" of the propriety of the subpoenas. The court of appeals concluded, based on a detailed review of the subpoena requests, that the Commission had "shown 'a substantial relationship'

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[6] See *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *SEC* v. *Laird*, 598 F.2d 1162, 1163 (9th Cir. 1979); *Barney* v. *United States*, 568 F.2d 116, 117 (8th Cir. 1978). But see *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978); *United States* v. *Friedman*, 532 F.2d 928, 931 (3d Cir. 1976); *FTC* v. *Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970).

between the information sought and [the] important government interest" in assuring full disclosure to the investing public (Pet. App. 12a). The court also found that the Commission's subpoena demands were closely tailored to the subject matter of the inquiry (*id.* at 12a-13a). Thus, as the court of appeals expressly stated (*id.* at 12a-14a), even accepting petitioners' claim that a heightened standard of review is required, it is clear that the Commission's subpoenas should be enforced. There is no need for this Court to grant further review of these essentially factual determinations.

Petitioners nonetheless argue (Pet. 14) that, because they are engaged in the publishing business, the First Amendment requires that the Commission's subpoenas be subjected to a "strict scrutiny" standard of review. That argument is inconsistent with the decisions of this Court. See *New York Times Co.* v. *Jascalevich*, 439 U.S. 1317, 1322 (1978) (White, J., in Chambers) (summarizing cases); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566-567 (1978); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); see also *Herbert* v. *Lando*, 441 U.S. 153, 169-177 (1979). The standard for enforcement of Commission subpoenas was set forth in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). That case establishes that agency subpoenas should be enforced against publishers over First Amendment objections when the district court determines "that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.* at 209 (footnote omitted); see also *id.* at 192-194.[7] This Court has rejected special standards for publishers even in connection with a search warrant authorizing entry into

a newspaper office to seize evidence—a substantially more intrusive method of obtaining information than a subpoena. *Zurcher* v. *Stanford Daily*, *supra*.

Moreover, here petitioners are suspected wrongdoers, not disinterested third-party witnesses.[8] The

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[7] As the court of appeals observed (Pet. App. 8a), persons engaged in the publishing business are not immune from application of regulatory statutes when they engage in commercial activities subject to those statutes. The treatment afforded publishers is no different from that afforded other businesses under general regulatory enactments. See, *e.g.*, *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937) ("The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws"); *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 194 ("[T]he Act's purpose was to place publishers of newspapers upon the same plane with other businesses"); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) ("The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity"); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-156 (1951) ("The injunction applies to a publisher what the law applies to others"); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967) (a business is not immune from regulation, including "[f]ederal securities regulation," because "it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others").

[8] One of the dissenting Justices in *Branzburg*, who argued in favor of a strict scrutiny test, observed that press entities are not entitled to First Amendment protection when, as here, they themselves are implicated in possible wrongdoing. *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 712 (Douglas, J., dissenting).

Commission's investigation focuses in substantial part on whether the Schedule 13D filings made by petitioners with the Commission concerning their ownership and control of Panax were false and misleading. Thus, this is not a case in which information is being sought from a newspaper reporter who has learned about the wrongful acts of others in the course of news gathering activities.[9]

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[9] Petitioners incorrectly assert (Pet. 16-18) that the decision of the court of appeals conflicts with *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). That case did not involve entities or persons who themselves were suspected of having engaged in unlawful conduct. Furthermore, unlike *Gibson*, and unlike *United States* v. *Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980), this case does not involve compelled disclosure of the identity of members of or contributors to political organizations. Compare *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

Gibson does not aid petitioners for an additional reason. *Gibson* held that a contempt citation issued for refusal to provide a legislative committee with a political organization's membership list was violative of the First and Fourteenth Amendments because the record failed to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." 372 U.S. at 546. This Court subsequently ruled in *Branzburg* that, assuming that the *Gibson* test applies to cases not involving membership or contributor lists, the test is fully satisfied—even with respect to newspaper reporters who are third-party witnesses—by a showing that (1) the government has a law enforcement interest in the matter being investigated, and (2) it appears likely that the subpoenaed members of the press "could supply information to help the government determine whether illegal conduct had occurred * * *." 408 U.S. at 701. There is no question that the Commission's subpoenas in this case meet those criteria.

Petitioners' reliance (Pet. 17-18) on *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972), which was handed

2. Petitioners' assertion (Pet. 7-11) that the district court erred in denying their demand for discovery into the Commission's deliberative processes leading to the initiation of its investigation is equally without merit. Petitioners do not dispute that subpoena enforcement proceedings are summary in nature and that district courts may, in their sound discretion, curtail or eliminate discovery as appropriate in such proceedings.[10]

While the precise formulation of the circumstances in which respondents in subpoena enforcement proceedings will be permitted even limited discovery against the government has varied among the courts of appeals, there is no conflict as to the relevant standard. Discovery is not granted in subpoena enforcement proceedings as a matter of course, as it is in other civil litigation. Discovery is available only after an initial showing has been made by the re-

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down one day after this Court's decision in *Branzburg*, is likewise misplaced. The Ninth Circuit panel, which apparently had utilized a strict scrutiny test, reconsidered its decision because of asserted conflicts with *Branzburg*. The court of appeals concluded that its decision could be reconciled with *Branzburg* because the panel held only that the government must "establish that there was a 'substantial connection' between the information sought and the criminal conduct" that the grand jury was investigating before members of the press could be held in contempt for refusing to answer questions. 466 F.2d at 1090-1091. To the extent that any of the discussion in *Bursey* conflicts with *Zurcher* and *Branzburg*, it has been superseded by those controlling decisions of this Court. In any event, the Commission's subpoenas here plainly met the test articulated in *Bursey* on rehearing.

[10] See Fed. R. Civ. P. 81(a)(3); *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971) (noting the "summary" nature of subpoena enforcement proceedings).

spondent that the ordinary presumption of regularity of government procedures should be displaced.[11]

No court of appeals has ordered discovery in a case similar to the present case.[12] The record below

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[11] As the District of Columbia Circuit has stated: "Discovery should be permitted only where the respondent is able to distinguish himself from 'the class of the ordinary [respondent].'" *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1388 (D.C. Cir.) (en banc), cert. denied, No. 80-354 (Nov. 17, 1980), quoting *United States* v. *Fensterwald*, 553 F.2d 231, 231-232 (D.C. Cir. 1977) (per curiam). See also *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc), slip op. 21-22 (submission of "sufficient meaningful evidence" in support of specific and non-frivolous allegations justifies limited discovery); *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, 42-43 n.9 (2d Cir.), cert. denied, 439 U.S. 822 (1978) (discovery appropriate in district court's sound discretion but only if respondent makes a "substantial preliminary showing"); *United States* v. *Moon*, 616 F.2d 1043, 1047 (8th Cir. 1980) (same); *United States* v. *Church of Scientology*, 520 F.2d 818, 824-825 (9th Cir. 1975) (discovery appropriate where respondent produces evidence supporting his allegations); *United States* v. *Salter*, 432 F.2d 697, 700 (1st Cir. 1970) (same); *United States* v. *National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972) (mere allegations of improper purpose do not justify discovery); *United States* v. *Newman*, 441 F.2d 165, 169 (5th Cir. 1971) ("the summoned party must raise in a substantial way the existence of substantial deficiencies in the summons proceedings" before obtaining even limited discovery); *United States* v. *Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969) (limited discovery of a case agent was proper where respondents made specific allegations that IRS systematically harassed them and the purpose of the investigation had sufficiently been put in issue).

[12] This case bears no resemblance to *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, *supra*, on which petitioners rely (Pet. 9). There is no basis for inferring that the *Wheeling-*

contained undisputed evidence that the Commission's investigation followed the public release of an official report, which, coupled with matters contained in documents filed with the Commission by petitioners themselves, strongly suggested that petitioners may have engaged in conduct violative of the federal securities laws. In addition, the Commission's counsel submitted an affidavit and declarations setting forth the Commission's basis for the investigation and the specific grounds for suspecting illegal activities. Those documents affirmed that the Commission's sole purpose in conducting the investigation was to determine whether violations of the federal securities laws had occurred.[13] Petitioners, who had the opportunity to counter the sworn statements submitted by the Commission's counsel, declined to do so (A. 217).[14] Thus, as the court of appeals stated (Pet.

Pittsburgh court would grant even limited discovery based on the "diffuse speculations concerning possible misuse of administrative authority" (Pet. App. 16a) involved in this case. In *Wheeling-Pittsburgh*, the subpoena recipient alleged that the investigation in question was the product of improper influence by a particular United States Senator who purportedly was rendering assistance to a rival company. The court emphasized that the subpoena recipient bears the "initial burden" of convincing the district court that it has raised a substantial objection to subpoena enforcement and that the "trial judge must evaluate the assertions of the recipient of the subpoena and any evidence introduced by both parties *before allowing substantial discovery*" (slip op. 21; emphasis added).

[13] In none of the cases cited by petitioners did the courts find that the government voluntarily came forward, as the Commission did here, with specific and undisputed evidence demonstrating a proper basis for the investigation.

[14] Some courts have suggested that a limited evidentiary hearing may be held based on a lesser showing than is necessary to grant discovery. See, *e.g.*, *United States* v. *Church of*

App. 16a), petitioners' entire argument for discovery against the Commission rested on nothing more than "diffuse speculations." [15]

Moreover, the subject matter of petitioners' broad ranging discovery requests—which inquired into the specific recommendations made by Commission staff members to the Commission with respect to petitioners' activities and the extent and nature of any contacts between Commission personnel and other persons prior to the commencement of the Commission's investigation (Pet. App. 38a-43a)—fall within the domain of governmental privilege. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975);

Scientology, supra, 520 F.2d at 824; *United States* v. *Salter, supra*, 432 F.2d at 700. The petitioners here, however, not only did not request an evidentiary hearing, but declined the invitation of the district court to present facts and arguments at the adversarial hearing that was held prior to issuance of the court's orders enforcing the Commission's subpoenas and denying petitioners' request for discovery (A. 217).

[15] Contrary to petitioners' contention (Pet. 11-13), the court below did not rule, either explicitly or implicitly, that the only purpose for which a party challenging an administrative subpoena may seek discovery is to demonstrate agency bad faith amounting to actual malicious intent. In explaining its determination that petitioners were not entitled to discovery, the court of appeals referred to that factor only in the course of distinguishing a case on which petitioners had heavily relied (Pet. App. 15a). And, in doing so, the court also referred to other factors—including the undisputed fact that the Commission had based its investigation in significant part on information contained in an official report of another government. Thus, the court's focus was not limited to malicious intent. Accordingly, even if petitioners are correct in interpreting *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc), as holding that actual malicious intent of the agency need not be shown to establish a defense to subpoena enforcement, this case presents no conflict with that holding.

McCelland v. *Andrus*, 606 F.2d 1278, 1287 (D.C. Cir. 1979). Petitioners made no showing in the district court that would justify discovery into the privileged area of the administrative deliberative process.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[16] As this Court recognized in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941), it is "not the function of the court to probe the mental processes" of an administrative agency. "Just as a judge cannot be subjected to such a scrutiny * * * so the integrity of the administrative process must be equally respected." *Ibid.* The Court added that "although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." *Ibid.* These concerns have particularly great relevance to investigations, which should not be encumbered with mini-trials of the investigating body. *United States* v. *Calandra*, 414 U.S. 338, 349-352 (1974).

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